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No.

IN THE

Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,

Petitioner,

v.

JOHN A. CARDEGNA AND DONNA REUTER,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Florida Supreme Court erred by holding, consistent with the Alabama Supreme Court but in direct conflict with six federal courts of appeals, that the Federal Arbitration Act allows a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) is void for illegality.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Buckeye Check Cashing, Inc. hereby states that it has no parent corporation, and that no publicly traded company owns 10% or more of its stock.

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INTRODUCTION

Almost forty years ago, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), this Court held that the Federal Arbitration Act ("FAA") does not allow a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) was fraudulently induced. Such a claim, the *Prima Paint* Court explained, must be presented to the arbitrators in the first instance, because there was no question that the parties had actually made an agreement to arbitrate. Thus, once it is clear that "the making of the agreement for arbitration ... is not in issue," a court may not entertain a challenge to the validity of the underlying contract.

That principle is controlling here, because respondents are challenging the validity of their underlying contracts with petitioner, but their challenge does not implicate "the making of the agreement for arbitration." Respondents neither deny that they assented to an arbitration agreement, nor challenge the arbitration agreement itself as illegal. Rather, respondents contend only that the underlying contracts are illegal as usurious. Under *Prima Paint*, that challenge must be resolved in the first instance by an arbitrator, not a court.

The Florida Supreme Court (like the Alabama Supreme Court in *Alabama Catalog Sales v. Harris*, 794 So. 2d 312, 314 n.2, 316-17 (Ala. 2000)), however, attempted to distinguish *Prima Paint* on the ground that the challenge there (fraud in the inducement) would have rendered the underlying contract *voidable* under state law, whereas the challenge here (illegality) would render the underlying contract *void* under state law. But, as Justice Cantero noted in dissent below (and as Justices See and Lyons noted in dissents in the Alabama case), that is a distinction without a difference. Whether the underlying contract is alleged to be voidable or void as a matter of *state* law has nothing to do the real issue—whether the challenge to the underlying contract implicates "the making of the agreement

for arbitration" as a matter of *federal* law. Not surprisingly, thus, all six federal courts of appeals that have considered this issue have concluded that a party cannot avoid arbitration under *Prima Paint* by challenging the underlying contract (as opposed to the arbitration clause itself) as illegal. *See Jenkins v. First Am. Cash Advance of Ga., LLC*, No. 03-16329, __ F.3d __, 2005 WL 388269 (11th Cir. Feb. 18, 2005); *Bess v. Check Express*, 294 F.3d 1298, 1304-06 (11th Cir. 2002); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 636-38 (4th Cir. 2002); *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483, 489-90 (6th Cir. 2001); *Harter v. Iowa Grain Co.*, 220 F.3d 544, 550 (7th Cir. 2000); *3H & Assocs., Inc. v. Hanjin Eng'g & Constr. Co.*, No. 97-16751, 1998 WL 657722, at *2 (9th Cir. Sept. 3, 1998) (unpublished); *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1161-62 (5th Cir. 1987). As these courts recognize, *Prima Paint* establishes as a matter of *federal* law that the validity of the arbitration clause is severable from the validity of the underlying contract.

Accordingly, this petition squarely presents a conflict on whether the FAA allows a party to avoid arbitration by challenging the underlying contract as illegal, and hence void *ab initio*, under state law. The Florida and Alabama Supreme Courts have answered that precise question of federal law in a manner that (as the dissent below noted) "disregards controlling federal law and the federal preference for enforcing arbitration clauses," App. 26a. And given that the Eleventh Circuit is among the contrary federal jurisdictions, the upshot is the intolerable situation that a defendant in Florida or Alabama can enforce its federal arbitration rights in the face of an illegality challenge if sued in a federal court, but not in the state court down the street. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) (noting that such disuniformity would "encourage and reward forum shopping" antithetical to the FAA). Because the decision below not only deepens an entrenched conflict between state courts of last resort and federal appellate courts

on a matter of federal law, but also evinces the very hostility to arbitration that motivated the FAA in the first place, this Court's review is warranted.

OPINIONS BELOW

The Florida Supreme Court's decision is reported at __ So. 2d __, 2005 WL 106966, and reprinted in the Appendix ("App.") at 1a-26a. The Florida District Court of Appeal's decision is reported at 824 So. 2d 228, and reprinted at App. 27a-32a. The Florida trial court's unreported decision denying petitioner's motion to compel arbitration is reprinted at App. 33a-34a.

JURISDICTION

The Florida Supreme Court rendered its decision on January 20, 2005. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT STATUTORY PROVISIONS

Section 2 of the Federal Arbitration Act provides in pertinent part:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Section 4 of the Federal Arbitration Act provides in pertinent part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any ... court ... for an order directing that such arbitration

> proceed in the manner provided for in such agreement. ... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration ... is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. ... If the making of the arbitration agreement ... be in issue, the court shall proceed summarily to the trial thereof.

9 U.S.C. § 4.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Buckeye Check Cashing, Inc. provides check-cashing and payroll advance services across the country, including Florida. These services allow consumers to obtain immediate cash, either by cashing a check that is deposited forthwith or by writing a check to be cashed at some future date against forthcoming income. Petitioner is licensed to do business in Florida under that State's Check Cashing and Foreign Currency Exchange Act, Fla. Stat. § 560.301, and its conduct is comprehensively regulated under the State's Deferred Presentment Act, Fla. Stat. § 560.401 *et seq*.

Respondents John A. Cardegna and Donna Reuter entered into separate deferred presentment transactions with petitioner. As part of those transactions, the parties signed a Deferred Deposit and Disclosure Agreement that contained an arbitration clause providing in pertinent part:

> Arbitration Provisions. Any claim, dispute, or controversy (whether in contract, tort or otherwise, whether pre-existing, present, or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement ... or the validity, enforceability, or

> scope of this Arbitration Provision or the entire Agreement (collectively "Claim"), shall be resolved, upon the election of you or us or said third-parties, by binding arbitration pursuant to this Arbitration Provision. ... This arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. Sections 1-16.

App. 2a, 27a-28a.

B. Proceedings Below

Notwithstanding that broad arbitration clause (which expressly encompasses "[a]ny claim, dispute, or controversy ... relating to ... the validity, enforceability, or scope of ... the entire Agreement," App. 2a, 27a), respondents filed this putative class action against petitioner in Florida state court in February 2001. The complaint charges petitioner with "shylocking," Compl. ¶ 61, and challenges the validity of the underlying contracts between respondents and petitioner under Florida law. Petitioner promptly moved to compel arbitration under the arbitration clause of those contracts.

The Florida trial court (Barkdull, J.) summarily denied the motion. App. 33a-34a. The court did not deny that respondents' claims fell within the plain language of the arbitration clause, but relied on two Florida intermediate appellate decisions holding that a court, not an arbitrator, must resolve a challenge to the legality of the underlying contract. App. 34a (citing *Party Yards, Inc. v. Templeton*, 751 So. 2d 121 (Fla. Dist. Ct. App. 2000), and *FastFunding v. Betts*, 758 So. 2d 1143 (Fla. Dist. Ct. App. 2000)).

Petitioner immediately appealed that order, and the intermediate appellate court reversed. *See* App. 27a-32a. The court noted that respondents "did not argue that they did not

enter into the arbitration agreement, nor did they challenge the validity of the terms of the arbitration agreement." App. 32a. Rather, the court explained, respondents "contend that the underlying contract is void ab initio because it is criminally usurious and, therefore, never existed at all." App. 30a. Relying on the Eleventh Circuit's decision in *Bess* (which in turn relied on this Court's decision in *Prima Paint*), the court held that respondents' challenge to the validity of the underlying contract must be resolved by an arbitrator, not a court, in the first instance. *See* App. 31a-32a.

Respondents then appealed that decision to the Florida Supreme Court, which—in a divided decision—again reversed. App. 1a-26a. The majority held that "an arbitration provision contained in a contract which is void under Florida law cannot be separately enforced while there is a claim pending in a Florida trial court that the contract containing the arbitration provision is itself illegal and void ab initio." App. 1a. *Prima Paint* was not controlling, the majority held, because the challenge to the underlying contract there (fraud in the inducement) would have rendered the contract *voidable* under state law, whereas the challenge to the underlying contract here (illegality) would have rendered the contract *void* under state law. App. 5a-6a. The majority acknowledged that this holding conflicted with the Eleventh Circuit's decision in *Bess*, but asserted that "the case presently before us is distinguishable because *Bess* was expressly resolved under federal law, not state law principles." App. 7a.

Justice Bell concurred specially to acknowledge "that the issue before us is one of federal law." App. 9a. Justice Bell proceeded, however, to "disagree with the conclusions that have been reached" by every federal appellate court to consider the issue. *Id.* According to Justice Bell, "[t]he issue of the underlying contract's legality must be determined by the courts before any claim or dispute arising out of the contract may be

referred to arbitration pursuant to the contract's arbitration clause." App. 12a.

Justice Cantero dissented, noting that "[t]he issue in this case is not whether a check-cashing contract is void as usurious," but "*who decides* whether the contract is void—the arbitrator, as provided in the contract itself, or the court." App. 13a (emphasis in original). That issue, Justice Cantero explained, is one of *federal* law under *Prima Paint*. App. 14a. Justice Cantero further noted that the void/voidable distinction on which the majority relied "is arbitrary and totally disconnected" from the language of the FAA. App. 17a. Indeed, he pointed out, "[i]n the last three years no fewer than three federal courts of appeals have decided the precise issue we confront today—whether, under the FAA, the issue of whether a check-cashing transaction is void as usurious is for the court or the arbitrator to decide," and "*[e]very one* unanimously has held that the issue is one for the arbitrators." *Id.* (referring to *Bess*, 294 F.3d at 1304-06; *Snowden*, 290 F.3d at 636-38; and *Burden*, 267 F.3d at 489-90; emphasis in original). Justice Cantero concluded that "[w]e should follow *Bess*, *Snowden*, and *Burden*, which considered the identical issue under identical facts and held that, under the plain language of the FAA, the issue of whether a check-cashing transaction is usurious must be determined by the arbitrators." App. 20a.

This petition follows.

REASON FOR GRANTING THE WRIT

The Florida Supreme Court Erred By Holding, Consistent With The Alabama Supreme Court But In Direct Conflict With Six Federal Courts Of Appeals, That The FAA Allows A Party To Avoid Arbitration By Claiming That The Underlying Contract Containing An Arbitration Clause (But Not The Arbitration Clause Itself) Is Void For Illegality.

The Florida Supreme Court erred by holding, consistent with the Alabama Supreme Court but in direct conflict with six federal courts of appeals, that the FAA allows a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) is void for illegality. That holding contravenes this Court's seminal decision in *Prima Paint*, which—as a matter of the "*federal* substantive law of arbitrability," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added)—divests courts of authority to entertain a challenge to the validity of a contract that does not implicate "the making of an agreement for arbitration."

Indeed, this Court granted *certiorari* in *Prima Paint* to decide "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators." 388 U.S. at 402. That issue previously had divided the lower courts. The Second Circuit had held that "arbitration clauses as a matter of *federal* law are 'separable' from the contracts in which they are embedded, and that where no claim is made that fraud was directed at the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." *Id.* at 402 & n.8 (emphasis added; citing, *inter alia, In re Kinoshita & Co.*, 287 F.2d 951 (2d Cir. 1961); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362

U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960)). The First Circuit, in contrast, had held that "the question of 'severability' is one of *state* law, and that where a State regards such a clause as inseparable a claim of fraud in the inducement must be decided by the court." *Id.* at 403 & n.9 (emphasis added; citing *Lummus Co. v. Commonwealth Oil Ref. Co.*, 280 F.2d 915, 923-24 (1st Cir. 1960)).

The *Prima Paint* Court squarely endorsed the Second Circuit's approach. As the Court explained, "Congress has provided an explicit answer" to the question in the FAA, *id.* at 403, which directs courts to compel arbitration where "the making of the agreement for arbitration ... is not in issue," 9 U.S.C. § 4. Under that provision, the Court held, "the making of the agreement for arbitration ... is not in issue" as a matter of *federal* law where a party to such an agreement challenges the validity of the underlying contract (as opposed to the validity of the arbitration clause itself). *See* 388 U.S. at 404 ("[T]he statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally."). Justice Black dissented on this point, noting that "[t]he Court here holds that the [FAA], *as a matter of federal substantive law*, compels a party to a contract containing a written arbitration provision to carry out his 'arbitration agreement' even though a court might ... hold the entire contract—including the arbitration agreement—void because of fraud in the inducement." *See id.* at 407 (dissenting opinion; emphasis added).

In light of *Prima Paint*, it is not surprising that all six federal courts of appeals that have addressed the issue (the Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits) have held that a party cannot avoid arbitration by challenging the legality of the underlying contract (as opposed to the arbitration clause itself). *See, e.g., Jenkins*, __ F.3d at __, 2005 WL 388269, at *11-13; *Bess*, 294 F.3d at 1304-06; *Snowden*, 290 F.3d at 636-

38; *Burden*, 267 F.3d at 489-90; *Harter*, 220 F.3d at 550; *3H & Assocs.*, 1998 WL 657722, at *2; *Lawrence*, 833 F.2d at 1161-62. Such a challenge, these courts have recognized, implicates "the *content* of the contracts, not their *existence*." *Bess*, 294 F.3d at 1305 (emphasis in original); *see also Burden*, 267 F.3d at 490 (challenge based on illegality of underlying contract involves "the substance, rather than the existence" of that contract). Whether the underlying contract is deemed voidable or void as a matter of *state* law, thus, is beside the point. The only relevant question is whether, as a matter of *federal* law, the challenge implicates "the making of an agreement to arbitrate"; if not, *Prima Paint* requires the challenge to be resolved by an arbitrator, not a court, in the first instance.

The Florida Supreme Court (like the Alabama Supreme Court), however, expressly rejected that approach. According to the majority below, "[t]here is a key distinction between the claim in *Prima Paint* and the claim presently before us: in *Prima Paint*, the claim of fraud in the inducement, if true, would have rendered the underlying contract merely *voidable*," whereas the claim of illegality here, if true, would render the contract "*void* from the outset" under state law. App. 5a-6a (emphasis modified); *see also Alabama Catalog Sales*, 794 So. 2d at 314 n.2, 316-17. The majority did not explain why that distinction should make any difference under the *federal* severability analysis adopted in *Prima Paint*. Rather, the majority asserted that the distinction between voidable and void contracts was meaningful as a matter of *state* law, on the ground that "if the underlying contract is held entirely void as a matter of law, all of its provisions, including the arbitration clause, would be nullified as well." App. 6a; *see also id.* at 7a ("We conclude that Florida public policy and contract law prohibit breathing life into a potentially illegal contract by enforcing the included arbitration clause of the void contract.").

The majority purported to find support for its decision in a line of federal appellate cases that, it alleged, "likewise distinguished *Prima Paint* and declined to extend its holding to instances where a party claims that a contract was void from its inception." App. 6a-7a (citing *Spahr v. Secco*, 330 F.3d 1266, 1272 (10th Cir. 2003); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 110 n.9 (3d Cir. 2000); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992); *Three Valleys Municipal Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1139-42 (9th Cir. 1991)); *see also Alabama Catalog Sales*, 794 So. 2d at 314 n.2, 316-17 (invoking this same line of cases). The Florida and Alabama courts' reliance on this line of federal cases, however, was misplaced. *Each* of these federal cases involved a claim that the plaintiff had never assented to the underlying contract in the first place, either because of a signatory's lack of authority (*Sphere Drake*, *Sandvik*, *Chastain*, *Three Valleys*), or mental incapacity (*Spahr*). Such claims, these courts held, *do* implicate "the making of the agreement for arbitration" within the meaning of *Prima Paint*, on the theory that if a signatory did not assent to the underlying contract in the first place, then the signatory did not assent to arbitration. Assuming that all of these cases were correctly decided, *but see Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 472-73 (5th Cir. 2002) (holding, in direct conflict with *Spahr*, that arbitrator is to decide a mental capacity defense that does not relate specifically to the arbitration agreement), the fact remains that *none* of these cases involved a challenge to the underlying contract based on illegality—which, of course, goes to the *substance* of the parties' agreement, not its *making*.

Indeed, as noted above, the federal appellate cases that *have* involved challenges based on the alleged illegality of the underlying contract (as opposed to the arbitration agreement) have uniformly concluded that such challenges do *not* implicate "the making of the agreement for arbitration" within the

meaning of *Prima Paint*, and thus must be resolved by the arbitrator in the first instance. *See Jenkins*, __ F.3d at __, 2005 WL 388269, at *11-13; *Bess*, 294 F.3d at 1304-06; *Snowden*, 290 F.3d at 636-38; *Burden*, 267 F.3d at 489-90; *Harter*, 220 F.3d at 550; *3H & Assocs.*, 1998 WL 657722, at *2; *Lawrence*, 833 F.2d at 1161-62. Several of these cases have expressly distinguished the foregoing cases involving assent on precisely this ground. *See, e.g., Bess*, 294 F.3d at 1306 ("None of the decisions cited ... from our sister circuits counsels a different conclusion [because] all of those cases involved questions of assent to the general contract."); *Snowden*, 290 F.3d at 637 ("[A]llegations of usurious rates of interest" neither "relate specifically to the Arbitration Agreement" nor "underlie a claim that [the party resisting arbitration] failed to assent to the terms of" the underlying contract); *Burden*, 267 F.3d at 490 ("[U]nlike the *Three Valleys* line of cases, Plaintiffs['] allegations ... do not concern their failure to assent to the [underlying contracts], and do not concern signatory power.").

In short, the cases on which the Florida and Alabama Supreme Courts relied are plainly inapposite, and have been distinguished in cases (like this one) involving claims that the underlying contract was void for illegality. Justice Cantero, dissenting below (like Justices See and Lyons, dissenting in the Alabama case), got the point exactly right: "the distinction in the cases is not between voidable contracts (which are arbitrable) and void contracts (which are not)," but rather "between contracts to which the plaintiff admittedly assented, but now claims are *either* void or voidable, and contracts to which the plaintiff gave no assent." App. 23a (dissenting opinion; emphasis in original); *see also Alabama Catalog Sales*, 794 So. 2d at 318 (See, J., dissenting) ("This case is unlike ... *Three Valleys* because [the plaintiff] admits that she signed the arbitration agreement."); *id.* at 320 (Lyons, J., dissenting) ("[The plaintiff's] contention that the contract is invalid [as usurious and hence illegal] is not grounded on a claim of want

of assent, but rather on a claim on unenforceability notwithstanding assent. Such a claim must be determined by the arbitrator, not the court."). Because respondents here "do[] not dispute that [they] assented to the arbitration agreement," App. 12a (Bell, J., specially concurring), the line of cases dealing with assent is simply not implicated, *see also* App. 23a ("[Respondents] do not allege that no contract was formed. They admit assenting to both the arbitration agreements and the underlying contracts.") (Cantero, J., dissenting); App. 32a ("Here, [respondents] did not argue that they did not enter into the arbitration agreement, nor did they challenge the validity of the terms of the arbitration agreement.").

The Florida and Alabama Supreme Courts' position that, as a matter of state law, a void contract never existed thus misses the point. As the Fifth Circuit has explained, "[t]he flaw in that [position] is that the legality of the contract has not yet been decided." *Lawrence*, 833 F.2d at 1162; *see also Alabama Catalog Sales*, 794 So. 2d at 318 (See, J., dissenting) ("We cannot know whether [the plaintiff's] contracts with the defendants are void under [Alabama law] until it has been determined that, as a fact, the defendants, in connection with those contracts, charged her more interest than is allowed by law."). The whole issue, as Justice Cantero observed in his dissent below, "is *who decides* whether the contract is void—the arbitrator, as provided in the contract itself, or the court." App. 13a. And, as noted above, *Prima Paint* answered that question: as a matter of federal law, the arbitrators resolve a challenge to the validity of the underlying contract where, as here, "the making of the agreement for arbitration ... is not in issue." Indeed, the Florida and Alabama Supreme Courts embraced the very reasoning advanced by Justice Black in his *Prima Paint* dissent, and *rejected* by this Court: "If the contract was procured by fraud, then, unless the defrauded party elects to affirm it, *there is absolutely no contract, nothing to be arbitrated*." 388 U.S. at 412 (dissenting opinion; emphasis

added). Again, the dispositive point is not whether a challenge would render the underlying contract voidable or void as a matter of *state* law, but whether that challenge implicates "the making of the agreement for arbitration" as a matter of *federal* law.

The Florida Supreme Court majority could not, and did not, deny that its holding was flatly inconsistent with federal appellate precedent. Rather, the majority purported to distinguish the Eleventh Circuit's decision in *Bess* (the only on-point federal appellate authority that the majority even acknowledged) on the ground that "*Bess* was expressly resolved under federal law, not state law principles." App. 7a. That purported "distinction," however, only underscores the depth of the conflict.

It is true that *Bess* was resolved under federal law, *see* 294 F.3d at 1306 n.3, but that is because it has been established since *Prima Paint* that the severability of an arbitration clause is a matter of substantive federal law under the FAA. Indeed, as noted above, this Court granted *certiorari* in *Prima Paint* to resolve that precise issue, and squarely held that the severability analysis is governed by federal, not state, law. *See* 388 U.S. at 402-04. Accordingly, to the extent the Florida Supreme Court majority purported to rest its decision on state-law grounds, it squarely contradicted not only *Bess*, but *Prima Paint* itself. The Florida Supreme Court majority's purported "distinction" of *Bess* is thus illusory, since *Bess* specifically rejected the precise basis for that purported "distinction." *See* 294 F.3d at 1306 n.3 (refusing to follow *Alabama Catalog Sales* because "we are not deciding questions of Alabama contract law; rather, we are deciding the scope of the district court's authority under [the FAA], a question of federal law"); *see also* App. 18a (Cantero, J., dissenting) (Florida Supreme Court majority's purported distinction of *Bess* is "blatantly wrong," because "[t]he identical situation exists here": "[j]ust as the Eleventh Circuit did not

decide questions of Alabama law, we are not deciding questions of Florida law."); App. 9a (Bell, J., specially concurring) ("I agree with Justice Cantero that the issue before us is one of federal law."). Needless to say, a state court cannot avoid review on a question of federal law by simply denying that it is a question of federal law in the first place. Whether the question is one of state or federal law *itself* presents a federal question, and here that question was conclusively resolved by this Court in *Prima Paint*.

Accordingly, this petition presents a direct conflict between the highest courts of two states (Florida and Alabama), on the one hand, and six federal courts of appeals (the Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits), on the other, on an important and recurring question of federal law. The time is ripe for this Court to resolve that conflict. Indeed, as Justice Bell emphasized in his special concurrence below, state courts "are not bound" by the decisions of intermediate federal appellate courts on matters on federal law, and "[u]ntil the United States Supreme Court resolves the issue, we must independently consider the federal question for ourselves." App. 9a. This Court should now "resolve[] the issue," *id.*, to prevent further wasteful litigation about the appropriate forum in which to resolve a claim of illegality in the first instance.

Allowing this conflict to fester, moreover, not only would promote forum-shopping (especially because litigants in Florida and Alabama will receive a different result on this federal question in federal and state court), but would undermine the whole purpose of arbitration in the first place: to promote speedy and efficient resolution of disputes. *See, e.g., Southland*, 465 U.S. at 7 (noting that "prolonged litigation" is "one of the very risks the parties, by contracting for arbitration, sought to eliminate"). An arbitration agreement is effectively worthless if it will be enforced in some courts but not others. Indeed, the Florida and Alabama Supreme Courts' approach

essentially writes arbitration agreements out of contracts subject to unproven claims of illegality, since—by definition—a court's resolution of such claims would leave nothing to be decided by an arbitrator. The bottom line is that there is simply no reason, other than discredited hostility to arbitration (the very hostility the FAA was enacted to address), to assume that an arbitrator is any less able than a court to resolve a challenge to the legality of a contract. *See* App. 26a ("[T]he majority opinion evince[s] a basic distrust of arbitration and place[s] the court as jealous guardian of the determination of legal issues.") (Cantero, J., dissenting).

Enforcing the FAA by sending disputes to arbitration where, as here, they do not implicate "the making of the agreement for arbitration," vindicates "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404. The time has come for this Court to vindicate that purpose, and the federal arbitration rights conferred by the FAA, once again.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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March 21, 2005

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Supreme Court of Florida

No. SC02-2161

JOHN CARDEGNA, et al.,
Petitioners,
v.
BUCKEYE CHECK CASHING, INC.,
Respondent.

[January 20, 2005]

ANSTEAD, J.

We have for review *Buckeye Check Cashing, Inc. v. Cardegna*, 824 So. 2d 228 (Fla. 4th DCA 2002), which expressly and directly conflicts with the decision in *FastFunding the Company, Inc. v. Betts*, 758 So. 2d 1143 (Fla. 5th DCA 2000). We have jurisdiction. *See* art. V, 3(b)(3), Fla. Const. For the reasons expressed below, we quash the decision of the Fourth District Court of Appeal in *Buckeye*, and approve the decision of the Fifth District Court of Appeal in *FastFunding*. We hold that an arbitration provision contained in a contract which is void under Florida law cannot be separately enforced while there is a claim pending in a Florida trial court that the contract containing the arbitration provision is itself illegal and void ab initio.

FACTUAL BACKGROUND

The relevant facts in *Buckeye* are summarized by the district court's opinion:

> Appellant, Buckeye Check Cashing, Inc., timely appeals from an order that denied its motion to

compel arbitration and to stay proceedings. We reverse and remand.

Appellees brought a class action lawsuit against Appellant. They alleged that Appellant made illegal usurious loans disguised as check cashing transactions in violation of various Florida Statutes. In response, Appellant filed a motion to compel arbitration and to stay proceedings, pursuant to the provisions for arbitration contained in the deferred deposit and disclosure agreement signed by Appellees. The agreement provided in pertinent part:

> Arbitration provisions. Any claim, dispute, or controversy (whether in contract, tort or otherwise, whether pre-existing, present, or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement ... or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement (collectively "Claim"), shall be resolved, upon the election of you or us or said third-parties, by binding arbitration pursuant to this Arbitration Provision.... This arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. Sections 1-16.
>
> Appellees filed a memorandum in opposition to Appellant's motion to compel arbitration in which they argued that the arbitration agreement should not be enforced because it is contained in an illegal usurious contract and is, therefore, void ab initio.

Buckeye, 824 So. 2d at 229. The district court continued:

> The trial court denied Appellant's motion to compel arbitration, relying on *Party Yards, Inc. v. Templeton*, 751 So. 2d 121 (Fla. 5th DCA 2000), and *FastFunding v. Betts*, 758 So. 2d 1143 (Fla. 5th DCA 2000). Appellant contends the Federal Arbitration Act applies and that the trial court erred when it failed to construe the arbitration provision in a manner consistent with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), and its progeny. Appellant also contends the trial court misplaced its reliance on *Party Yards* and *FastFunding*. We agree.

Buckeye, 824 So. 2d at 229-30. The Fourth District reversed the trial court's decision and held that Cardegna's challenge to the underlying contract's validity must be resolved by an arbitrator, not a trial court.

ANALYSIS

The petitioners claim that the Fourth District's holding in *Buckeye* conflicts with the Fifth District's decision in *FastFunding*, holding that arbitration could not be compelled under a contract that would be void under Florida law and that the issue of the contract's legality must be determined in Florida's courts.

FastFunding

In *FastFunding*, FastFunding the Company, Inc., appealed a trial court's order that denied FastFunding's motion to compel arbitration. *See FastFunding*, 758 So. 2d at 1143. The complaint asserted that "under the guise of a payment instrument sale," FastFunding compelled the payment of unconscionable, usurious interest rates on check cashing loans, in violation of various Florida statutes. *Id.* at 1144. Pursuant to the arbitration clause of the contract, FastFunding moved to compel arbitration. *Id.* FastFunding's motion was denied by the trial court. *Id.*

FastFunding appealed the trial court's ruling to the Fifth District Court of Appeal, which, consistent with its recent decision in a similar case, held that the trial court properly denied FastFunding's motion to compel arbitration. The district court reasoned: "If Ms. Betts is correct in her complaint that the contract violates the usury laws, then the contract is illegal and an arbitrator could not require Ms. Betts to perform under the contract. Pursuant to *Party Yards, Inc.*, the trial court was correct in refusing to order the parties to arbitrate Ms. Betts' claims." *FastFunding*, 758 So. 2d at 1144.

In the earlier decision, *Party Yards, Inc. v. Templeton*, 751 So. 2d 121 (Fla. 5th DCA 2000), the district court held that "[w]here the facts alleged by the plaintiff are sufficient to put the making of a lawful agreement at issue, the trial court must determine the validity of the agreement before compelling a party to submit to arbitration." *Id.* at 124. Judge Sharp, writing for the district court, reasoned:

> A court's failure to first determine whether the contract violates Florida's usury laws could breathe life into a contract that not only violates state law, but also is criminal in nature, by use of an arbitration provision. This would lead to an absurd result. Legal authorities from the earliest time have unanimously held that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. Illegal promises will not be enforced in cases controlled by federal law.

Id. at 123 (citation omitted). Thus, the Fifth District concluded: "A party who alleges and offers colorable evidence that a contract is illegal cannot be compelled to arbitrate the threshold issue of the *existence* of the agreement to arbitrate; only a court can make that determination." *Id.* at 123-24. We agree with Judge Sharp's reasoning and analysis.

Prima Paint

Buckeye asserts that the U.S. Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), supports the Fourth District's decision and requires that an arbitrator resolve Cardegna's illegality claim, because the parties agreed in the contract to be governed by the Federal Arbitration Act and the cases applying the Act.

In *Prima Paint*, the Supreme Court resolved the issue of "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators." *Id.* at 402. Having acknowledged that various courts have differed in their approach to resolving this question, the Court agreed with the approach of the Second Circuit Court of Appeals that the arbitration clause contained in a contract may be severable from the contract itself, and that "where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud." *Id.* at 402. In so holding, the Court looked to the express language of the United States Arbitration Act (now known as the Federal Arbitration Act (FAA)), which required a federal court to order arbitration to proceed if it determined that the making of the arbitration agreement itself or failure to comply with the arbitration agreement was not in issue. *See Prima Paint*, 388 U.S. at 402. The Court reasoned that this requirement reflected the intent of Congress to provide a speedy remedy for parties who elected to resolve disputes via arbitration. *Id.* at 404.

However, we conclude that the rationale of *Prima Paint* should not be extended to the facts of this case. There is a key distinction between the claim in *Prima Paint* and the claim presently before us: in *Prima Paint*, the claim of fraud in the inducement, if true, would have rendered the underlying contract merely *voidable*. In the case before us today, however,

the underlying contract at issue would be rendered void from the outset if it were determined that the contract indeed violated Florida's usury laws. Therefore, if the underlying contract is held entirely void as a matter of law, all of its provisions, including the arbitration clause, would be nullified as well.

Appellate courts in other states have also distinguished *Prima Paint* and reached conclusions similar to those of the Fifth District in *FastFunding* and *Party Yards, Inc.* *See Rosenthal v. Great Western Fin. Sec. Corp.*, 14 Cal. 4th 394, 926 P.2d 1061, 1074 (Cal. 1996) (stating that contracts that render an agreement void ab initio are not arbitrable); *R.P.T. of Aspen, Inc. v. Innovative Communications, Inc.*, 917 P.2d 340, 342 (Colo. Ct. App. 1996) (stating that "if a party asserts that the entire contract is *illegal*, the court must determine this threshold issue"). A number of federal courts have likewise distinguished *Prima Paint* and declined to extend its holding to instances where a party claims that a contract was void from its inception. *See Spahr v. Secco*, 330 F.3d 1266, 1272 (10th Cir. 2003) (holding "that the rule announced in *Prima Paint* does not extend to a case where a party challenges a contract on the basis that the party lacked the mental capacity to enter into a contract"); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 591 (7th Cir. 2001) (concluding that "as arbitration depends on a valid contract an argument that the contract does not exist can't logically be resolved by the arbitrator"); *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 110 n. 9 (3d Cir. 2000) (stating that *Prima Paint's* "holding dealt strictly with fraud in the inducement of the larger contract and made no broader pronouncements regarding 'void' agreements"); *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992) (stating that "*Prima Paint* has never been extended to require arbitrators to adjudicate a party's contention, supported by substantial evidence, that a contract *never existed at all*"); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991) (limiting *Prima Paint* to voidable contracts and

holding that a challenge to a signatory's authority to bind plaintiffs to an agreement must be resolved by a trial court). We agree with the reasoning of these cases distinguishing *Prima Paint*.

We acknowledge that recently, under similar facts, the Eleventh Circuit Court of Appeals rejected the argument that a contract's legality was to be determined by a trial court, not an arbitrator. *See Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002). In that case, the plaintiffs also challenged the legality of a check cashing contract's arbitration clause. The Eleventh Circuit held that because there was no dispute about the plaintiffs' assent to the contract itself, the contract was presumptively valid, and any disputes, including those about the validity of the contract, were to be determined by an arbitrator. *Id.* at 1305. However, the case presently before us is distinguishable because *Bess* was expressly resolved under federal law, not state law principles. The court said: "In reaching our decision, however, *we are not deciding questions of Alabama contract law*; rather, we are deciding the scope of the district court's authority under 9 U.S.C. 4, a question of federal law." *Bess*, 294 F.3d at 1306 n. 3 (emphasis supplied).

We conclude that Florida public policy and contract law prohibit breathing life into a potentially illegal contract by enforcing the included arbitration clause of the void contract. Florida's law has long held that contracts which are determined to be against public policy and void should not be enforced. "A contract which violates a provision of the constitution or a statute is void and illegal and will not be enforced in our courts." *Harris v. Gonzalez*, 789 So. 2d 405, 409 (Fla. 4th DCA 2001). This Court itself long ago declared:

> The inherent and inalienable right of every man to enter into contracts or refuse so to contract is not only recognized but well established. Competent persons have the utmost liberty of contracting and

> when these agreements are shown to be voluntarily and freely made and entered into, then the courts usually will uphold and enforce them. The general right to contract is subject to the limitation that the agreement must not violate the Federal or State Constitutions or state statutes or ordinances of a city or town or some rule of the common law.

Wechsler v. Novak, 26 So. 2d 884, 887 (Fla. 1946). As others have also noted, "Contracts in violation of statutory prohibitions are void, and issues arising under such contracts are therefore not arbitrable." *R.P.T.*, 917 P.2d at 342 (citing 2 Martin Domke, *Commercial Arbitration* 8.06 (rev. ed.1995)).

In other words, there are no severable, or salvageable, parts of a contract found illegal and void under Florida law. Judge Sharp's observation in *Party Yards, Inc.*, that a contrary holding would lead to an absurd result is right on point. We do not believe federal arbitration law was ever intended to be used as a means of overruling state substantive law on the legality of contracts.

CONCLUSION

Accordingly, we hold that where a party sufficiently alleges that a contract is void for violation of Florida's usury laws, the Florida courts, and not an arbitrator, must first determine the contract's legality before a party may be required to submit to arbitration under a provision of the contract. Hence, Cardegna's claim that the underlying check cashing contract is illegal and void ab initio as being usurious must be resolved by a trial court before arbitration of any other disputes may be compelled. We approve the Fifth District's opinions in *FastFunding* and *Party Yards, Inc.*, and we quash and remand *Buckeye* for further proceedings consistent with this opinion.

It is so ordered.

WELLS, LEWIS, QUINCE, and BELL, JJ., concur.

BELL, J., concurs specially with an opinion.

CANTERO, J., dissents with an opinion.

PARIENTE, C.J., recused.

BELL, J., specially concurring.

I agree with Justice Cantero that the issue before us is one of federal law, and in that respect I agree that the decisions of federal courts of appeals should be considered as persuasive authority on the issue. But I do not agree with the conclusion reached by Justice Cantero or the federal decisions on which he relies. Although we should carefully consider the decisions of intermediate-level federal courts on issues of federal law, we are not bound by such decisions. Until the United States Supreme Court resolves the issue, we must independently consider the federal question for ourselves. Because I disagree with the conclusions that have been reached by the federal courts cited by Justice Cantero, I join the majority's decision.

I.

I will begin by briefly restating the issue. The petitioners (hereinafter referred to collectively as "Cardegna," the named petitioner) entered into numerous check-cashing transactions (also known as "payday loans") with Buckeye Check Cashing. Cardegna brought a class action (on behalf of himself and those similarly situated) in which he argues that these check-cashing transactions were actually nothing other than usurious loans under Florida law, which would make the check-cashing contracts void ab initio and unenforceable. Buckeye sought to stay the trial court proceedings and compel arbitration of Cardegna's claims pursuant to the arbitration clause contained in the check-cashing contracts. The arbitration clause provided that

> [a]ny claim, dispute, or controversy (whether in contract, tort or otherwise ... including statutory, common law, intentional tort, and equitable claims)

> arising from or relating to this [check-cashing] Agreement ... or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement ... shall be resolved ... by binding arbitration pursuant to this Arbitration Provision.

Buckeye Check Cashing, Inc. v. Cardegna, 824 So. 2d 228, 229 (Fla. 4th DCA 2002).

It is also important to note that Cardegna does not claim that the arbitration clause itself (separately, as opposed to the contract as a whole) somehow is invalid. His claim, rather, is that the contract in its entirety is invalid and unenforceable because the check-cashing transaction underlying the contract was illegal. That issue—whether the check-cashing transaction is illegal—has not yet been decided. Indeed, the issue before us here is who will (or must) decide that issue: a court or an arbitrator. The issue, in other words, is whether the trial court was bound to enforce the arbitration clause and required to compel arbitration of Cardegna's claims. The majority holds that it was not, and I agree.

II.

To explain why I agree with the majority that the trial court was not required to enforce the arbitration clause and compel arbitration of Cardegna's claims, I begin with the language of the Federal Arbitration Act (FAA). The FAA provides that

> [a] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2000). Essentially, the FAA requires that an arbitration clause be treated in the same manner as any other

contractual provision: Legislatures cannot create rules, and courts cannot apply rules, that discriminate against or give a less-favored status to arbitration clauses. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984). The FAA does not require, however, that state courts treat arbitration clauses more favorably than they would treat any other contractual provisions. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) ("[By passing the FAA, Congress] intended courts to enforce arbitration agreements into which parties had entered, and to place such agreements upon the same footing as other contracts.") (internal brackets, quotation marks, and citations omitted).

I believe the decisions cited by Justice Cantero go too far towards treating arbitration clauses as a class of "super" clauses, immune from a state's otherwise generally applicable contract law. I do not believe the FAA was intended to preempt a state's generally applicable consumer protection laws (as opposed to laws directed specifically at the validity or enforceability of arbitration clauses, either in general or in certain types of contracts, *see, e.g., Southland Corp.*, 465 U.S. at 10), and to require the arbitration of the very legality of the underlying contract (of which the arbitration clause was a part) under a state's usury laws. The state's regulatory authority in the consumer protection arena could be severely weakened if predatory lenders are allowed to circumvent the state courts and direct to arbitration claims that their lending practices violate state law. *See* Joshua R. Welsh, Comment, *Has Expansion of the Federal Arbitration Act Gone Too Far?: Enforcing Arbitration Clauses in Void Ab Initio Contracts*, 86 Marq. L. Rev. 581, 610 (2002).

If the transactions at issue here are determined by a state court not to be illegal per se, then of course any particular claims or disputes arising out of the transactions would presumably be referable to arbitration. But the question here is whether there even was an agreement to arbitrate—an

enforceable agreement to arbitrate. "The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.'" *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002) (quoting *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). Whether a valid and enforceable arbitration agreement exists is a threshold question that must be answered by the courts, and it must be answered by reference to the state's generally applicable contract law.[1] Cardegna does not dispute that he assented to the arbitration agreement; but assent alone does not make for a valid and enforceable contract. There is more to "the making of the arbitration agreement," dissenting op. at [17a], than mutual assent. By examining arbitration clauses only for "assent," Justice Cantero's (and the federal circuit courts') approach does not simply treat arbitration clauses "separate[ly]" or "independently," dissenting op. at [20a], but *differently*.

The issue of the underlying contract's legality must be determined by the courts before any claim or dispute arising out of the contract may be referred to arbitration pursuant to the contract's arbitration clause—not because we are applying a more stringent standard to the enforceability of the arbitration clause (a course of action that would violate the FAA), but because we are, as the FAA allows, applying the generally applicable "grounds as exist at law or in equity for the

[1] There is, of course, a somewhat troubling "circularity" to this reasoning. After all, we do not yet know if the check-cashing transactions are illegal under Florida law, so we do not know if the contract here really was void ab initio. Yet the dissenting position itself rests on a sort of circular reasoning. The dissent would compel the arbitration of the legality claim on the ground that until that claim is resolved, there are no grounds for invalidating the arbitration clause. But if the arbitrator were to conclude that the contracts were illegal and unenforceable, we then would have enforced an unenforceable contract.

revocation of any contract." 9 U.S.C. § 2. If, under Florida law, no contract ever existed here, then by definition no enforceable agreement to arbitrate ever existed. The dissenting opinion and the federal decisions on which it relies have elevated arbitration clauses to a more favored status, exempting them from the state's otherwise generally applicable contract law. The FAA, however, mandates only that arbitration clauses be given equal status. In this case, if a valid and enforceable contract exists, then a valid and enforceable arbitration clause exists. The problem is that we do not yet know if a valid and enforceable contract exists. I therefore concur in the majority's decision.

CANTERO, J., dissenting.

The issue in this case is not whether a check-cashing contract is void as usurious. That issue will be determined under Florida law. The issue here is *who decides* whether the contract is void—the arbitrator, as provided in the contract itself, or the court. That issue must be decided under federal law, specifically the Federal Arbitration Act. The majority confuses these issues. The majority also disregards the plain language of the Federal Arbitration Act, fails correctly to apply the United States Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), and either ignores or fails to distinguish the federal cases compelling arbitration in identical circumstances. I respectfully dissent.

I. The FAA and *Prima Paint*

Contrary to the majority's assumption, the issue in this case arises under federal, not Florida, law. As no one disputes, the arbitration agreement itself provides that it "is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. Sections 1-16." The parties concede they are governed by the FAA.

Any discussion of the arbitrability of the parties' dispute should therefore begin with the plain language of the FAA—language conspicuously absent from the majority opinion. Section 2 of the FAA provides that an agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000). Section 4 of the FAA provides in pertinent part as follows:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement .... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

9 U.S.C. § 4 (2000) (emphasis added). Therefore, as many courts have recognized, under the FAA the issue for a court confronted with a plaintiff seeking to avoid arbitration is whether the plaintiff is contesting the making of the arbitration agreement or the underlying contract.

Given the parties' agreement to be governed by the FAA, the district court in this case correctly recognized its task as simply to apply controlling federal law to the case at hand. *See Buckeye Check Cashing, Inc. v. Cardegna*, 824 So. 2d 228, 230 (Fla. 4th DCA 2002); *see also Jensen v. Rice*, 809 So. 2d 895, 899 (Fla. 3d DCA 2002) (recognizing that the FAA "supersedes inconsistent state law" and "[a]s a result, Florida courts must enforce arbitration agreements that are valid and enforceable under the [FAA], even where, as here, the arbitration agreement would not be enforceable under Florida law").

Federal law favors arbitration. As the United States Supreme Court has recognized, the purpose of the FAA is to override the judiciary's reluctance to enforce arbitration agreements. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989). The FAA places such agreements on the same footing as other contracts. *Id.* "The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983). Under the FAA, questions of arbitrability "must be resolved with a healthy regard for the federal policy favoring arbitration," even when general state law principles of contract interpretation are applied. *Volt Info. Scis.*, 489 U.S. at 475-76. "The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25.

In concluding that the check-cashing agreement's enforceability should be decided in arbitration, the district court relied in part on *Prima Paint*, where the United States Supreme Court addressed "whether the federal court or an arbitrator is to resolve a claim of 'fraud in the inducement,' under a contract governed by the [FAA]." 388 U.S. at 396-97; *see* 824 So. 2d at 230. Citing to section 4 of the Act (quoted above), which requires arbitration to go forward if "the making of the agreement for arbitration or the failure to comply therewith is not in issue," the Court concluded that the statute itself answers the question. 388 U.S. at 403. That is, "the statutory language does not permit the federal court to consider claims of fraud in the inducement *of the contract generally*." *Id.* at 404 (emphasis added). The Court held that a court *may* adjudicate a claim of "fraud in the inducement of the arbitration clause itself," *id.* at

403-04, because then the issue is the "making" of the *arbitration* agreement. Thus, a court "may consider *only* issues relating to the making and performance *of the agreement to arbitrate*." *Id.* at 404 (emphasis added). As the Court stated:

> Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.... *We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.*

Id. at 403-04 (footnote omitted) (emphasis added).

Applying these principles, the Court held that because the fraud claim did not specifically address the arbitration agreement and the arbitration clause was sufficiently broad to encompass the dispute, including "legal" issues, the parties must proceed to arbitration. *Id.* at 406-07.

The import of *Prima Paint*, then, is that under the FAA, arbitration agreements or arbitration clauses contained in contracts are treated separately from the underlying contracts. The FAA expressly limits courts to determining whether the making of the arbitration agreement itself—not the underlying contract—is disputed. The only exception, as explained later, is where a party contests its very assent to the underlying contract, and therefore to the arbitration agreement as well.

The majority violates the FAA's express directive. It dismisses *Prima Paint* as applicable only to voidable—as opposed to void—contracts. Nothing in that opinion makes that distinction, and even though the issue in that case involved a voidable contract—it was allegedly fraudulently induced—the

Court did not limit its holding. *Cf. Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 110 n. 9 (3d Cir. 2000) (noting that the dissenting opinion in *Prima Paint* "impl [ies] that the majority rejected the void/voidable distinction"). Nor can its holding logically be limited to such contracts because the Court interpreted the plain language of the FAA, which does not exempt from arbitration allegations that the underlying contract is void. The Court did acknowledge a distinction—apparent in the statute itself—but not between void and voidable contracts. Such a distinction is arbitrary and totally disconnected from the statutory language. Rather, the Court distinguished between issues concerning the making of the underlying contract, which are arbitrable, and issues concerning the making of the arbitration agreement, which are not.

II. Federal Appellate Cases on Point

In the last three years no fewer than three federal courts of appeals have decided the precise issue we confront today—whether, under the FAA, the issue of whether a check-cashing transaction is void as usurious is for the court or the arbitrator to decide. *Every one* unanimously has held that the issue is one for the arbitrators. Nevertheless, the majority fails to distinguish one of them and simply ignores the others.

Most recently, the Eleventh Circuit Court of Appeals decided this issue. In *Bess v. Check Express*, 294 F.3d 1298, 1304 (11th Cir. 2002), the plaintiffs had signed deferred payment transactions containing arbitration agreements governed by the FAA. They filed a class action suit against Check Express, alleging that the transactions constituted usurious loans under state law. *Id.* at 1301-02. When Check Express invoked the arbitration clause, the plaintiffs contended that the court, not an arbitrator, must decide the legal question of whether the transactions were void as usurious. The court recognized that its task was not to determine the legality of the contract, but simply to address the threshold question of who should decide

the issue, the arbitrator or the court. *Id.* at 1304. Noting that the FAA limits courts to the issue of the "making of the arbitration agreement," the court concluded that it must determine whether the allegation that the underlying contract was illegal placed at issue *the making of the arbitration agreement*. *Id.* The court emphasized that the plaintiffs did not dispute having assented to the underlying contracts. The court thus concluded that the question of the legality of the contract was for the arbitrator because the case fell "within the 'normal circumstances' ... where the parties have signed a presumptively valid agreement to arbitrate any disputes, including those about the validity of the underlying transaction." *Id.* at 1306 (citing *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992)).

The majority acknowledges *Bess*, but distinguishes it on the purported ground that the federal court was deciding an issue of federal law, while this Court is deciding an issue of state law. Majority op. at [7a-8a]. That conclusion is blatantly wrong.

The majority cites a footnote in which the Eleventh Circuit stated the following in pertinent part:

> Colburn contends that we are bound by Alabama law in deciding defenses to the arbitration agreement, and therefore, [Alabama case law] requires that the void *ab initio* argument be decided by the court. In reaching our decision, however, we are not deciding questions of Alabama contract law; rather we are deciding the scope of the district court's authority under [the FAA], a question of federal law.

Id. at 1306 n.3.

The identical situation exists here. Just as the Eleventh Circuit did not decide questions of Alabama law, we are not deciding questions of Florida law. Specifically, we are *not* deciding whether the check-cashing contract is usurious. The

sole issue before *both* courts is the same: *who decides* the legality of the underlying contract? The issue here, as in *Bess*, is one of federal law because the FAA governs the arbitration agreement. *Bess* cannot be distinguished.

The Fourth Circuit Court of Appeals also has addressed the precise claim presented here. In *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 636 (4th Cir. 2002), *cert. denied*, 537 U.S. 1087 (2002), the court considered whether the plaintiff's contention that a "deferred deposit transaction," such as the one in this case, was a usurious loan void under Maryland law was subject to arbitration. Noting that the plaintiff did not dispute that the FAA governed the arbitration agreement or that her claim fell within the scope of the arbitration agreement, the court applied *Prima Paint* and the FAA's requirement that the party contesting arbitration must allege grounds relating to the arbitration clause, not the underlying contract. *Id.* at 636. The court concluded that under the severability doctrine of *Prima Paint*, arbitration must proceed because the plaintiff's "allegations of usurious rates of interest ... d[id] not relate specifically to the Arbitration Agreement [nor did] they underlie a claim that [the plaintiff] failed to assent to the terms of the ... Agreement." *Id.* at 637.

Finally, in *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 486-87 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002), the plaintiffs also alleged that the check cashing agreements they signed were usurious in violation of state law and therefore void. The court concluded that because the plaintiffs admitted assenting to the agreements, the challenge to the legality of the underlying contract constituted a "challenge [to] the substance, rather than the existence, of the loan agreements." *Id.* at 490; *accord Furgason v. McKenzie Check Advance of Indiana Inc.*, No. IP00-121-C H/G, 2001 WL 238129 (S.D. Ind. Jan. 3, 2001) (holding that a plaintiff cannot avoid arbitration by alleging or showing the illegality of a so-called payday loan contract); *see also Sweet Dreams Unlimited,*

Inc. v. Dial-A-Mattress Int'l, Ltd., 1 F.3d 639, 642 (7th Cir. 1993) (holding that under *Prima Paint* the claim that the underlying contract should be rescinded because it violated state law was subject to arbitration under the broad scope of the contract's arbitration clause).

We should follow *Bess*, *Snowden*, and *Burden*, which considered the identical issue under identical facts and held that, under the plain language of the FAA, the issue of whether a check-cashing transaction is usurious must be determined by the arbitrators. These decisions are persuasive on matters of federal law. *See State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976) (stating that federal court rulings are persuasive).

Justice Bell, specially concurring, agrees with me that "the issue before us is one of federal law" and that "the decisions of federal courts of appeals should be considered as persuasive authority." Concurring op. at [9a]. He is not persuaded by those decisions, however, because he thinks they "go too far towards treating arbitration clauses as a class of 'super' clauses, immune from a state's otherwise generally applicable contract law." Concurring op. at [11a]. I disagree with Justice Bell for two reasons.

First, the federal circuit courts have treated arbitration clauses not as a class of "super" clauses, but as a class of *separate* clauses—separate, that is, from the other clauses in a contract. Under the reasoning of the federal courts, arbitration clauses are not immune from state contract law. They are simply evaluated *independently* of the rest of the contract under "the state's otherwise generally applicable contract law." Concurring op. at [11a].

Second, although it is true that *Bess*, *Snowden*, and *Burden* are only persuasive, they are all based on *Prima Paint*, which is binding. All three cases reached the same conclusion on similar facts because they each found *Prima Paint* indistinguishable, as I do, and therefore controlling. *See Bess*, 294 F.3d at 1306

(stating that, under the holding of *Prima Paint*, courts may only "consider issues relating to the making and performance of the agreement to arbitrate"); *Snowden*, 290 F.3d at 637 (stating that the independent evaluation of arbitration clauses is a "rule ... derived from the Supreme Court's opinion in *Prima Paint*"); *Burden*, 267 F.3d at 490 (finding no logical distinction between *Prima Paint* and cases where a party "subsequently discover[s] that certain terms of the contract may violate state law"). The majority's reasoning contradicts not just the federal circuit court cases, but also *Prima Paint*.

III. Federal Cases Based on Different Circumstances

Instead of following the federal cases that have decided this identical issue under identical facts, the majority relies on other cases that considered different attacks on different types of contracts. In particular, the majority cites cases refusing to refer issues to arbitration. Majority op. at [6a-7a]. As the Sixth Circuit emphasized in *Burden*, 267 F.3d at 489, however, in those cases the question was *not* whether a party assented to a contract that later was alleged to violate state law. 267 F.3d at 490. Rather, in each case, the complaining party alleged that because of some defect in signatory power, no contract *ever* was formed. *See, e.g., Sandvik*, 220 F.3d at 112 (holding that where a party claimed that the signee lacked authority to bind it to the contract containing the arbitration clause, "the very existence of [the] agreement [was] disputed" and the court must resolve the threshold question of whether an arbitration agreement exists); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1138, 1144 (9th Cir. 1991) (holding that the court, not the arbitrator, must decide whether the signatory had authority to bind the plaintiffs to contracts containing arbitration clauses); *Spahr v. Secco*, 330 F.3d 1266, 1273 (10th Cir. 2003) (holding that a claim that the signatory lacked the mental capacity to enter into the contract goes to the making of both the contract and the arbitration agreement); *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587, 590-91 (7th

Cir. 2001) ("A person whose signature was forged has never agreed to anything. Likewise with a person whose name was written on a contract by a faithless agent who lacked authority to make that commitment. This is not a defense to enforcement, as in *Prima Paint*; it is a situation in which no contract came into being[.]").

In *Bess*, the Eleventh Circuit similarly distinguished its earlier decision in *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992). In *Chastain*, the plaintiff never personally signed the customer agreements at issue, and thus she contended that she was not bound by the arbitration provisions within them. 957 F.2d at 853. The court acknowledged that "parties cannot be forced to submit to arbitration if they have not agreed to do so." *Id.* at 854 (citing *Volt Info. Scis., Inc.*, 489 U.S. at 478). Thus, "[u]nder normal circumstances, an arbitration provision with a contract admittedly signed by the contractual parties is sufficient to require the district court to send any controversies to arbitration." 957 F.2d at 854. The court found the case before it to be the "rare" case in which "the very existence of *any* agreement, *including the existence of an agreement to arbitrate*" was at issue. *Id.* Under those facts, "there [wa]s no presumptively valid general contract." *Id.* If a party did not sign the underlying contract, then the party may not have agreed to arbitration. Thus, the making of the arbitration agreement *was* at issue, and under the FAA a court, not an arbitrator, should decide the question. *Id.* at 855.

In *Bess*, the Eleventh Circuit noted both the distinctive facts of *Chastain* and its narrow holding. 294 F.3d at 1305. The court explained that "the focus of the court's decision in *Chastain* ... was on the question of assent, i.e., whether the parties mutually had agreed to the contracts," and contrasted the claim before it that the deferred payment contracts violated state law:

> At bottom, Colburn challenges the *content* of the contracts, not their *existence*. Indeed, unlike the contracts in *Chastain*, both the arbitration agreement and the deferred payment contracts were signed by Colburn, and there is no question about Colburn's assent to those contracts. Thus, this case falls within the "normal circumstances" described in *Chastain, where the parties have signed a presumptively valid agreement to arbitrate any disputes, including those about the validity of the underlying transaction*. Therefore, the issue raised by Colburn—whether the deferred payment transactions are void as illegal—is one for the arbitrator, not the court.

294 F.3d at 1305-06 (emphasis added).

Thus, the distinction in the cases is not between voidable contracts (which are arbitrable) and void contracts (which are not), as the majority finds. Rather, it is between contracts to which the plaintiff admittedly assented, but now claims are *either* void or voidable, and contracts to which the plaintiff gave no assent. If no contract was formed, then the arbitration agreement, which was *part* of that contract, was not formed, either. Courts must determine this threshold issue. The plaintiffs in this case, however—and in all the cases involving check-cashing transactions—do not allege that no contract was formed. They admit assenting to both the arbitration agreements and the underlying contracts. Rather, they argue that the contracts were usurious. Therefore, the "making of the agreement for arbitration" is not at issue, and under the FAA the arbitrators, not the courts, must decide the issue.

IV. The Majority's Reliance on *Party Yards*

The majority also relies on and approves *Party Yards, Inc. v. Templeton*, 751 So. 2d 121 (Fla. 5th DCA 2000). The court in that case, however, did not have the benefit of the three federal

cases I have discussed—*Bess*, *Snowden*, and *Burden*—which are precisely on point and dictate the outcome here. Moreover, the court's analysis is based on the presumption that the contract at issue was illegal (an analysis later rebutted). *See* 751 So. 2d at 123 ("The issue here ... is whether a contract that violates state law and is criminal in nature, can be referred to arbitration.").[2] The court expressed the unwarranted fear that without a court determination of the legality of the now-presumptively illegal contract, the court "could breathe life" into an illegal contract by sending the case to arbitration. 751 So. 2d at 123. This simply is not so.

In *Lawrence v. Comprehensive Business Services Co.*, 833 F.2d 1159 (5th Cir. 1987), the Fifth Circuit rejected a similar argument. The plaintiffs claimed that their franchise agreement, which contained an arbitration clause, was illegal under Texas state law and that if the court ordered arbitration it would "'in essence ... effectuate an illegal agreement.'" *Id.* at 1162. The court noted that the "argument presumes that the contract is illegal and that presenting the dispute to the arbitrator somehow effectuates an illegal contract. The flaw in the argument is that the legality of the contract has not yet been decided." *Id.* The court also rejected the plaintiffs' claim that the issue was one of law to be decided by a court because they "d[id] not contend that the agreement did not allow the arbitrator to decide purely legal questions." *Id.* Because there was no attack on the arbitration clause itself, the court held that "*Prima Paint* requires that their claim of illegality be arbitrated pursuant to the contract." 833 F.2d at 1162. Finally, the court rejected the claim that enforcing the arbitration provision of the allegedly illegal contract would contravene state law, saying

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[2] The Fifth District has since decided that deferred payment transactions such as those involved in *Party Yards* and in this case are *not* usurious. *See Betts v. Ace Cash Express, Inc.*, 827 So. 2d 294, 297 (Fla. 5th DCA 2002).

that the "argument forgets that the arbitrability of an issue under the Federal Arbitration Act is a matter of federal law." *Id.*

Contracts are presumed valid until held to be illegal. In *National Railroad Passenger Corp. v. Consolidated Rail Corp.*, 892 F.2d 1066, 1070 (D.C. Cir. 1990), the court held it error to treat an arbitration clause as unenforceable "merely because the substantive contract *may*—if the district court is correct about public policy—*be unenforceable*." Citing the FAA's sole exception to arbitration, a "flaw in the formation of the agreement to arbitrate," the court explained its holding as follows:

> For a court to intervene before the arbitrator has determined what the contract means, and what it requires in the particular circumstances of their dispute, because he *may* determine that it requires the performance of an unlawful act, prematurely disrupts the system of private ordering upon which "public policy"—as declared in the Arbitration Act and in the Supreme Court cases liberally interpreting it—places maximum possible reliance....
>
> In sum, if parties have validly agreed to submit a dispute to arbitration, we see no reason not to enforce that agreement. If the arbitrator construes the contract so as to require someone to commit an illegal act, a court can then refuse to enforce the arbitrator's decision. A court cannot, however, bypass the arbitration process simply because a public policy issue might arise.

Id. at 1071 (emphasis added).

The majority here commits the same error as did the court in *Party Yards*. The majority holds that "an arbitration provision contained in a contract *which is void under Florida law* cannot be separately enforced while there is a claim pending in a

Florida trial court that the contract containing the arbitration provision is itself illegal and void ab initio." Majority op. at [1a] (emphasis added). Thus, the majority assumes the illegality of the contract in determining that a court should decide the legality of a contract. Under the parties' arbitration agreement, however, that issue is for the arbitrator.

Finally, the court in *Party Yards* relied on cases such as *Three Valleys*, 925 F.2d at 1136, and *Chastain*, 957 F.2d 851. As explained above, in each of these cases the parties' *assent* to the contract was at issue. Here, on the other hand—and in cases such as *Bess*, *Snowden*, and *Burden*—the parties assented both to the contracts and to the arbitration clauses.

At their heart, *Party Yards* and the majority opinion evince a basic distrust of arbitration and place the court as jealous guardian of the determination of legal issues. By endorsing *Party Yards*, the majority not only disregards controlling federal law and the federal preference for enforcing arbitration clauses, but it has created a new analysis for arbitration claims. Under the express terms of the FAA, a party opposed to arbitration must challenge the making of the arbitration agreement itself. Under the majority's reasoning, the opponent need only allege that the underlying contract violates a state statute or public policy in a way that renders it void. Because the majority's decision contradicts federal law favoring arbitration and fails to follow federal cases directly on point, I respectfully dissent.

District Court of Appeal of Florida,
Fourth District

BUCKEYE CHECK CASHING, INC.,
a foreign corporation d/b/a Checksmart,
Appellants,
v.
John A. CARDEGNA and Donna Reuter, etc., et al.,
Appellees.

No. 4D01-3549

July 24, 2002
Rehearing Denied Sept. 4, 2002

DELL, JOHN W., Senior Judge.

Appellant, Buckeye Check Cashing, Inc., timely appeals from an order that denied its motion to compel arbitration and to stay proceedings. We reverse and remand.

Appellees brought a class action lawsuit against Appellant. They alleged that Appellant made illegal usurious loans disguised as check cashing transactions in violation of various Florida Statutes. In response, Appellant filed a motion to compel arbitration and to stay proceedings, pursuant to the provisions for arbitration contained in the deferred deposit and disclosure agreement signed by Appellees. The agreement provided in pertinent part:

> *Arbitration provisions.* Any claim, dispute, or controversy (whether in contract, tort or otherwise, whether pre-existing, present, or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement ... or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement (collectively "Claim"), shall be

> resolved, upon the election of you or us or said third-parties, by binding arbitration pursuant to this Arbitration Provision.... This arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. Sections 1-16.

Appellees filed a memorandum in opposition to Appellant's motion to compel arbitration in which they argued that the arbitration agreement should not be enforced because it is contained in an illegal usurious contract and is, therefore, void ab initio. Appellees also asserted that the arbitration clause was unconscionable. However, Appellant correctly points out that at the hearing before the trial court, Appellees did not argue that the arbitration provision was unconscionable. Accordingly, the issue of unconscionability is not properly before this court for review. *See Parlier v. Eagle-Picher Indus., Inc.*, 622 So. 2d 479 (Fla. 5th DCA 1993).

The trial court denied Appellant's motion to compel arbitration, relying on *Party Yards, Inc. v. Templeton*, 751 So. 2d 121 (Fla. 5th DCA 2000), and *FastFunding v. Betts*, 758 So. 2d 1143 (Fla. 5th DCA 2000). Appellant contends the Federal Arbitration Act applies and that the trial court erred when it failed to construe the arbitration provision in a manner consistent with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L. Ed. 2d 1270 (1967), and its progeny. Appellant also contends the trial court misplaced its reliance on *Party Yards* and *FastFunding*. We agree.

Appellant correctly argues that federal law controls because the arbitration agreement expressly provides that "this arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act...." *See Donald & Co. Sec., Inc. v. Mid-*

Florida Cmty. Services, Inc., 620 So. 2d 192 (Fla. 2d DCA 1993).

In *Prima Paint Corp.*, 388 U.S. at 403-04, 87 S.Ct. 1801, the Supreme Court stated:

> Accordingly, if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.... We hold, therefore, that in passing upon a *§ 3* application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.

(footnotes omitted)

In *Manning v. Interfuture Trading, Inc.*, 578 So. 2d 842 (Fla. 4th DCA 1991), this court affirmed an order compelling arbitration because the record showed that the appellant's claim of fraud in the inducement in the making of the arbitration agreement was actually based on the entire transaction rather than only the arbitration agreement. The court, in *Manning*, stated:

> In several subsequent cases the holding in *Prima Paint* has been construed as requiring that where the entire transaction is infected by the alleged fraud or other ground for avoidance, the matter should be submitted to arbitration. Put another way, a rule has been distilled from the *Prima Paint* rationale that only where the attack is specifically and exclusively directed toward the arbitration clause or a separate agreement to arbitrate may the court try the issue before submitting the balance of the controversy to arbitration....

Id. at 843 (citations omitted). *See also Spitz v. Prudential-Bache Secs., Inc.*, 502 So. 2d 479 (Fla. 4th DCA 1987).

Appellees do not challenge the validity of the arbitration provision. Rather, they contend that the underlying contract is void ab initio because it is criminally usurious and, therefore, never existed at all. They further argue that *Party Yards*[1], *FastFunding*, and *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851 (11th Cir. 1992), support the general proposition that a trial court must determine the legal validity of the underlying contract before compelling arbitration. However, *Chastain* is consistent with the Supreme Court's decision in *Prima Paint* and does not support Appellees' argument. In *Chastain*, the appellant denied that she had signed the customer agreements that contained the arbitration clauses. The court stated that

> Because on the unusual facts of this case we believe that "the making of the arbitration agreement ... [is] in issue,".... Chastain is entitled to have the district court, rather than a panel of arbitrators, determine whether or not she agreed to arbitrate her claims against Robinson-Humphrey.

Chastain, 957 F.2d at 852-53.

Appellees argue that the trial court was correct because the court in *Chastain* said, "[h]owever, if the validity of the agreement to arbitrate is in issue, a district court, not a panel of arbitrators, must decide if the arbitration clause is enforceable against the parties." *Id.* at 854. We are not persuaded by this argument. The *Chastain* court also said "[t]hus, 'the first task

[1] In *Party Yards*, the district court of appeal stated, "we find that the trial court's reliance on *Prima Paint* was misplaced because that case is inapplicable under the facts presented here. In this case, the language in the arbitration provision of the contract is not broad enough to encompass a usury violation...." Here, however, the arbitration provision expressly includes statutory claims and is broad enough to encompass a usury violation.

of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.'" *Id.* (citation omitted). Additionally, the court noted that it

> recognizes that the *Prima Paint* doctrine has been extended to require arbitration panels to decide many issues regarding the validity of a contract containing arbitration language—including allegations that such contracts are voidable because they involved duress, undue coercion, confusion, mutual mistake, or unconscionability.

Id. at 855 (citations omitted).

In *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002), the court of appeals considered the use of *Chastain* as support for an argument that the underlying contract was void ab initio. The court stated:

> Likening his void *ab initio* allegations to the contentions in *Chastain* that no contract ever existed, Colburn argues that, as in *Chastain*, the court must determine the legality of the deferred payment transactions before deciding whether to compel arbitration. But the focus of the court's decision in *Chastain*, as just explained, was on the question of assent, i.e., whether the parties mutually had agreed to the contracts. By contrast, Colburn urges that the transactions in this case are void, not because he failed to assent to the essential terms of the contracts, but because those terms allegedly render the contracts illegal under Alabama law. At bottom, Colburn challenges the *content* of the contracts, not their *existence*. Indeed, unlike the contracts in *Chastain*, both the arbitration agreement and the deferred payment contracts were signed by Colburn, and there is no question about Colburn's assent to those contracts. Thus, this case

falls within the "normal circumstances" described in *Chastain*, where the parties have signed a presumptively valid agreement to arbitrate any disputes, including those about the validity of the underlying transaction. Therefore, the issue raised by Colburn—whether the deferred payment transactions are void as illegal—is one for the arbitrator, not the court. None of the decisions cited by Colburn from our sister circuits counsels a different conclusion. Like *Chastain*, all of those cases involved questions of assent to the general contract.... *See Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 489-90 (6th Cir. 2001) (concluding that plaintiffs' allegations that deferred payment contracts were void as illegal constituted challenge to substance of loan agreements and should thus be decided by arbitrator rather than by court). Because Colburn's void *ab initio* argument is an issue for the arbitrator, it does not furnish an adequate basis for denying PayDay's motion to compel arbitration.

Id. at 1305-06 (emphasis supplied in original).

Here, appellees did not argue that they did not enter into the arbitration agreement, nor did they challenge the validity of the terms of the arbitration agreement. Accordingly, we reverse the trial court's order denying appellant's motion to compel arbitration and remand this cause for further proceedings.

REVERSE AND REMANDED.

SHAHOOD and HAZOURI, JJ., concur.

IN THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

JOHN A. CARDEGNA,
and DONNA REUTER
individually and on behalf
of others similarly situated,
Plaintiffs,

CASE NO: CL 01-1162 AJ
CLASS REPRESENTATION

vs.

BUCKEYE CHECK
CASHING, INC. a foreign
corporation, dba
CHECKSMART,
BUCKEYE CHECK
CASHING OF FLORIDA,
INC. a foreign corporation
dba CHECKSMART and
UNKNOWN ENTITIES
AND INDIVIDUALS

Defendants.

ORDER DENYING DEFENDANT BUCKEYE CHECK CASHING, INC.'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDING

This cause coming before the Court on July 13, 2001 on Defendant Buckeye Check Cashing, Inc's. Motion to Compel Arbitration and Stay Proceeding and the Court having

considered the pleadings, memoranda of law and the argument of counsel, it is:

ORDERED AND ADJUDGED that based on the Fifth District Court of Appeal's decisions in *Party Yards, Inc. v. Templeton*, 751 So. 2d 121, and *Fastfunding v. Betts*, 758 So. 2d 1143, that defendants' Motion to Compel Arbitration is DENIED. The court will hold an evidentiary hearing to determine whether there can be a colorable showing that the contracts containing the arbitration provisions are void ab initio, as being usurious.

Done and Ordered in chambers at West Palm Beach, Florida this 6th day of August, 2001.

/s/
Thomas H. Barkdull, III
CIRCUIT COURT JUDGE

cc Counsel of Record